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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1703

ALDEN J. FULKERSON,

Appellant,

vs.

THE STATE BAR OF CALIFORNIA,

Respondent.

On Appeal From The Supreme Court
Of The State Of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Appellant, pursuant to United States Supreme Court Rules 13(2) and 15, filed this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise jurisdiction in this case.

OPINION BELOW

The Opinion of the Supreme Court of the State of California is reported at 1980 - No. 10, California Official Reports (Advance Sheets), Supreme Court Minutes (3/20/80) page 4 and a copy is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is envoked pursuant to 28 U.S.C. § 1257(2) as being an appeal which draws in question the validity of California Business and Professions Code §§ 6001, 6008.4, 6010, 6028, 6030, 6031 (portions of the California "State Bar Act") on the ground that as applied and construed it is repugnant to the Constitution of the United States. (See: *Lathrop v. Donohue*, 367 U.S. 820, re appeal involving a State Bar.)

Appellant, by way of a petition for review properly and timely filed in the Supreme Court of the State of California, sought to review the action of the Board of Governors of the State Bar of California to employ by contract a Legislative Advocate. The grounds of Appellant's verified petition were that Appellant timely objected, verbally and in writing, to the Board of Governors concerning the aforementioned contract. Thereafter the Board of Governors entered into said contract. Appellant alleged that the action of the Board exceeded its legal authority and thereby violated the First Amendment rights of the members of the State Bar and of this Appellant. Appellant's accompanying brief relied on the case of *Abood v. Detroit Board of Education*, 431 U.S. 209.

The State Bar responded to the petition that the retention and payment of a legislative advocate is within the statutory scope and authority of the Board to carry out the executive functions of the State Bar.

The Supreme Court of California denied the petition for review without comment. (Appendix A)

In the event that the Court does not consider appeal the proper mode of review, Appellant requests the petition whereon this appeal is taken be regarded and acted upon as a petition for Writ of Certiorari pursuant to 28 U.S.C. 2103.

The jurisdiction of this Court is requested pursuant to 28 U.S.C. 1257(3) as being a Writ of Certiorari which draws into question Appellant's First Amendment rights which have been set up and claimed under the Constitution of the United States and which rights were ignored by the Supreme Court of the State of California in refusing to hear the petition for review. (See: *Anonymous Nos. 6 & 7 v. Baker*, 360 U.S. 287, re certiorari involving a State Bar.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment and Fourteenth Amendment of the Constitution of the United States.

This case also involves numerous California Business and Professions Code Sections (Bus. & Prof. Code §§ 6001, 6008.4, 6010, 6028, 6030, 6031) which sections are part of the California State Bar Act and are set forth as follows:

§ 6001. State Bar; perpetual succession; seal; powers; laws applicable

The State Bar of California is a public corporation. It is hereinafter designated as the State Bar.

The State Bar has perpetual succession and a seal and it may sue and be sued. It may, for the purpose of carrying into effect and promoting its objectives:

(a) Make contracts.

(b) Borrow money, contract debts, issue bonds, notes and debentures and secure the payment or performance of its obligations.

(c) Own, hold, use, manage and deal in and with real and personal property.

(d) Construct, alter, maintain and repair buildings and other improvements to real property.

(e) Purchase, lease, obtain options upon, acquire by gift, bequest, devise or otherwise, any real or personal property or any interest therein.

(f) Sell, lease, exchange, convey, transfer, assign, encumber, pledge, dispose of any of its real or personal property or any interest therein, including without limitation all or any portion of its income or revenues from membership fees paid or payable by members.

(g) Do all other acts incidental to the foregoing or necessary or expedient for the administration of its affairs and the attainment of its purposes.

No law of this state restricting, or prescribing a mode of procedure for the exercise of powers of state public bodies or state agencies, or classes thereof, including but not by way of limitation, the provisions contained in Division 3 (commencing with Section 11000), Division 4 (commencing with Section 16100), and Part 1 (commencing with Section 18000) and Part 2 (commencing with Section 18500) of Division 5, of Title 2 of the Government Code, shall be

applicable to the State Bar, unless the Legislature expressly so declares.

§ 6008.4. Exercise of powers by board of governors

All powers granted to the State Bar by Sections 6001 and 6008.3 may be exercised and carried out by action of its board of governors. In any resolution, indenture, contract, agreement, or other instrument providing for, creating, or otherwise relating to, any obligation of the State Bar, the board may make, fix, and provide such terms, conditions, covenants, restrictions, and other provisions as the board deems necessary or desirable to facilitate the creation, issuance, or sale of such obligation or to provide for the payment or security of such obligation and any interest thereon, including, but not limited to, covenants and agreements relating to fixing and maintaining membership fees.

§ 6010. Board of governors in general

The State Bar is governed by a board known as the board of governors of the State Bar. The board has the powers and duties conferred by this chapter.

§ 6028. Payment of expenses; compensation

(a) The board may make appropriations and disbursements from the funds of the State Bar to pay all necessary expenses for effectuating the purposes of this chapter.

(b) Except as provided in subdivision (c), no member of the board shall receive any other compensation than his necessary expenses connected with the performance of his duties as a member of the board.

(c) In addition to any other amounts for expenses which may be received by such members, public members of the board appointed pursuant to the

provisions of Section 6013.5, public members of the examining committee appointed pursuant to Section 6046.5, and public members of any disciplinary board appointed pursuant to Section 6086.6 shall receive, out of funds appropriated for such purpose, fifty dollars ($50) per day for each day actually spent in the discharge of official duties, but in no event shal such payment exceed five hundred dollars ($500) per month.

§ 6030. Executive functions; enforcement of chapter; injunction

The board shall be charged with the executive function of the State Bar and the enforcement of the provisions of this chapter. The violation or threatened violation of any provision of Articles 7 (commencing with Section 6125) and 9 (commencing with Section 6150) of this chapter may be enjoined in a civil action brought in the superior court by the State Bar and no undertaking shall be required of the State Bar.

§ 6031. Functions in aid of jurisprudence, justice, professional matters and public relations

The board may aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public.

QUESTION PRESENTED

Whether the integrated State Bar of California, created and governed by State law, has the right to enter into a contract for legislative advocacy (on matters yet unknown) and spend mandatory membership dues for that purpose over the objection of one member?

STATEMENT OF THE CASE

I

BACKGROUND INFORMATION

Alden J. Fulkerson, Appellant, is an attorney admitted to practice law before the Supreme Court of the State of California and since July 31, 1952, has continuously been a duly licensed attorney authorized to practice before the Courts of the State of California and as such has continuously been an active member of the State Bar of California.

The State Bar of California is a public corporation orginally created by legislative action in 1927 and later its existence was and now is governed by a state constitutional provision. Every person admitted and licensed to practice law in California is a member of the State Bar of California, Judges excepted. (Cal. Const. Art. VI § 9)

The Board of Governors, the executive committee which runs the State Bar, is a creature of Statute (Bus. & Prof. Code § 6010) and consists of twenty-two members. Fifteen Governors are elected from nine districts by State Bar members. Six Governors are appointed by the Governor of California. One Governor is selected by and represents the California Young Lawyers Association. (Bus. & Prof. Code §§ 6011 — 6013.5 incl.)

In fifty-two years the California State Bar has advanced the administration of justice and has served with distinction in many areas, both the interests of its members and the interests of the public. In the past ten years a growing discontent with the State Bar has surfaced.[1]

Of the many complaints only one appears material to this discussion. In 1979, the State Bar sponsored dues bill was vetoed by the Governor. The State Bar then employed a Legislative Advocate to obtain the passage of the present dues legislation. This 1979 contract for legislative advocacy of the dues bill was represented as being a one-time expenditure of approximately $40,000.00. The resulting dues statute covered State Bar membership dues for the year 1980 and by its terms is repealed on January 1, 1981. (Bus. & Prof. Code § 6140; 1979 Statutes Chapter 1041) If no State Bar dues bill is passed in 1980 there will be no Statute for 1981 State Bar membership dues.

The 1980-81 State Bar contract for lobbying deals with legislative advocacy in connection with the State Bar dues bill and other unspecified proposed bills sponsored by the State Bar and/or others. The term of the contract is two years (January 1, 1980, to December 31, 1981) at a cost in excess of $230,000.00 due to a cost of living clause. There is also a termination clause

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[1] Two excellent reports were completed in 1980 dealing with the current status of the State Bar of California. Each of these reports were cited in the briefs filed before the California Supreme Court. The reports are: "A Talking Piece," Interim Report of the Monterey Committee on the structure of the State Bar of California (January 10, 1980) and "A Report On The California State Bar," Legislative Analyst, State of California, pursuant to Resolution Statutes 1979, Chapter 44 (SCR 30) (March 1980).

which could include forfeiture penalties in the event the State Bar elects to terminate the contract after the first year.

The current two year session of the California Legislature ends in 1980 (usually before the November 1980 elections). On or about January 5, 1981, a new two year legislative session begins. No pending bills in California are carried over from one two year legislative session to the next two year legislative session.

II

FACTS OF CASE

Appellant first learned of the proposed action of the Board of Governors from the press. On or about December 11, 1979, Appellant expressed his objections by telephone to the President of the State Bar, Charles Clifford, Esq. Immediately thereafter Appellant expressed his objections to his District Representative on the Board of Governors, Kevin Midlam, Esq. This latter discussion was lengthy and involved the ramifications of legislative advocacy, the *Abood* case, and the possibility of Appellant bringing suit.

On or about December 14, 1979, in San Francisco, a majority of the Board of Governors (over Mr. Midlam's objection) preliminarily approved the 1980-81 lobbying contract. On January 7, 1980, Appellant sent an open letter to the Board of Governors objecting to the 1980-81 lobbying contract and requested reconsideration on the part of the Board. Following receipt of Appellant's letter a majority of the Board of Governors (again over Mr. Midlam's objection) approved by resolution the 1980-81 lobbying contract at issue herein.

On February 11, 1980, Appellant filed with the California Supreme Court his petition to review the action of the Board of Governors of the State Bar relating to the 1980-81 lobbying contract.[2] The grounds were the violation of First Amendment constitutional rights.

The contract provides in part that the lobbyist is "To represent the State Bar as legislative advocates on legislation . . ." dealing with the annual membership fees, the scope and structure of the State Bar, legislative programs of the State Bar and others, and "To perform all tasks and duties necessary to accomplish the foregoing."

On February 26, 1980, the State Bar responded to the petition that "The retention and payment of a legislative advocate, whether or not he is called a 'lobbyist' is within the scope and authority of the board to carry out the executive functions of the State Bar ([Bus. & Prof. Code] §§ 6001, 6008.4, 6010, 6030, 6031) to do all acts necessary or expedient for the administration of its affairs and attainment of its purposes ([Bus. & Prof. Code] § 6001) and to pay all necessary expenses for 'effectuating the purposes of [the State Bar Act]' ([Bus. & Prof. Code] § 6028)."

On March 20, 1980, the petition for review was denied by the Supreme Court of California. (Appendix A)

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[2] Appellant sought also to envoke the inherent powers of the California Supreme Court over its members by way of mandate to the Board of Governors to draft a set of By-Laws for the State Bar to be approved by the members for the operation of the bar under the Judicial Branch of government. This second cause of action is entirely a State matter, involves no Federal issues, and is not the subject of this petition. The possibility of an organization of this type is, however, discussed herein.

III

THE ONLY REMEDY AVAILABLE BELOW

The petition filed below was pursuant to California Rule of Court, Rule 952(c) which reads as follows:

> (c) [Review of other decisions] A petition to the Supreme Court to review any other action of the Board of Governors of The State Bar, or of any board or committee appointed by it and authorized to make a determination pursuant to the provisions of the State Bar Act, shall be filed within 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner, addressed to him at his last known address appearing on the records of The State Bar. The petition shall be verified, shall specify the grounds relied on and shall be accompanied by the petitioner's brief and proof of service on The State Bar of three copies of the petition and the brief. Within 10 days after service of the petition, The State Bar may serve and file an answer and brief. Within 5 days after service of the answer the petitioner may serve and file a reply. If a review is ordered by the Supreme Court, The State Bar, within 45 days after the filing of the order, may serve and file a supplemental brief. Within 15 days after service of such brief the petitioner may file a reply brief, of which three copies shall have been served on The State Bar. [Rule 59(b) as renumbered and amended effective October 1, 1973; previously amended effective July 1, 1968.]

The only California Supreme Court decisions applicable are pursuant to former Rule 59(b) which for our purposes is substantially the same as Rule 952(c) quoted above.

A petition to review the actions of the Board of Governors in erroneously assessing a $10.00 membership fee for the Clients' Security Fund was proper. (*Hersh v. State Bar,* 7 Cal.3d 241)

The phrase "if a review is ordered by the Supreme Court . . ." has repeatedly been held in admission cases that the Supreme Court has a duty to undertake an independent examination of the evidence in such cases. (*Hallinan v. Committee of Bar Examiners*, 65 Cal.2d 447, 450-451; *March v. Committee of Bar Examiners*, 67 Cal.2d 718, 720; *Bernstein v. Committee of Bar Examiners*, 69 Cal.2d 90, 97; *Siegal v. Committee of Bar Examiners*, 10 Cal.3d 156, 160)

No California Statute, Rule of Court, or case authorizes a procedure to review the action taken by the Board of Governors other than the procedure used in this case.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Appellant filed a petition to review action of the Board of Governors of the State Bar pursuant to Rule 952(c). In paragraph 12 Appellant alleged:

> "The Board of The State Bar, by entering into the aforesaid contract, exceeded its legal authority and/or membership approval authority by the expenditure of State Bar funds for a professional non-lawyer lobbyist to advocate political issues before the California State Legislature and thereby violated the First Amendment rights of the members of The State Bar and of this petitioner."

The State Bar did not answer the petition by way of admission or denial of the above allegations but rather filed as part of a Response to Petition a preliminary statement which concluded as follows:

> "For reasons which follow, the petition should be denied." (RB1)

The State Bar in its response maintained as follows:

> "The retention and payment of a legislative advocate, whether or not he is called a 'lobbyist,' is within the scope of the authority of the Board to carry out the executive functions of the State Bar (§§ 6001, 6008.4, 6010, 6030, 6031) to do *all* acts necessary or expedient for the administration of its affairs and attainment of its purposes (§ 6001), and to pay all necessary expenses for 'effectuating the purposes of [The State Bar Act]' (§ 6028)." (RB20)

Appellant submits that unequivocably the Federal question of the First Amendment rights of the members of the State Bar and of this individual Appellant were raised as applicable to the Board of Governors' action pursuant to the Fourteenth Amendment of the United States Constitution.

The decision of the California Supreme Court as applicable is stated as follows:

> "Petition for Writ of Review . . . is denied."

If this decision is in the nature of a ruling on demurrer, since no Answer is on file, the ruling means that the State Bar controls the individual members' constitutional rights, *i.e.*, the

statute is construed in a manner repugnant to the Constitution of the United States, thus an appeal lies pursuant to 28 U.S.C. 1257(2).

If the decision below is in the nature of a ruling on the merits of all of the pleadings, the ruling necessarily means that the State Bar Act controls the individual members' constitutional rights, *i.e.,* again the statute is construed in a manner repugnant to the Constitution of the United States, thus an appeal lies pursuant to 28 U.S.C. 1257(2).

If the decision below is considered as a discretionary or arbitrary denial of the petition or to assume jurisdiction over the petition or simply a statement to the effect that the Supreme Court of California doesn't want to become involved, then the nature of the decision is in effect no decision on the constitutional issues raised. Appellant's right is specifically set up and claimed under the Constitution of the United States and for whatever the reason those rights have been ignored and Appellant is left without a remedy, thus the nature of these proceedings would be by Writ of Certiorari under 28 U.S.C. 1257(3).

THE FEDERAL QUESTION IS SUBSTANTIAL

I

LEGAL HISTORY OF LEGISLATIVE ADVOCACY AND MANDATORY DUES

This field of law originated in union membership cases, the starting point being *Railway Employees' Dept. v. Hanson*, 351

U.S. 225, 238, wherein the Court made two statements as follows:

> "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar."

> "We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement."

(*Railway Employees' Dept. v. Hanson*, 351 U.S. at 238)

The progeny of *Hanson* is discussed by the Court in *Abood v. Detroit Board of Education,* 431 U.S. 209, commencing at 215.

One intervening case involved the integrated State Bar of Wisconsin wherein the majority of this Court stated:

> "We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes."

(*Lathrop v. Donohue*, 367 U.S. 820, 848)

Justice Douglas in his dissent recognized the potential problem facing a profession when he states:

> "This regimentation appears in humble form today. Yet we know that the Bar and Bench do not move to a single 'non-partisan' objective.... Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the Hanson case as a narrow exception to be closely confined. Unless we so treat it, we practically give carte blanche to any legislature to put at least professional people into goose-stepping brigades."

(*Lathrop v. Donohue*, 367 U.S. at 883-884)

The *Abood* case recognized principally two of the progeny of the *Hanson* Case (*International Ass'n of Machinists v. Street*, 367 U.S. 740; *Railway Clerks' v. Allen*, 373 U.S. 113) where the remedial question concerning the violation of First Amendment rights were discussed. Principally these holdings divide membership dues into two categories, the mandatory dues which support the primary function of the organization, to-wit: collective bargaining, and optional dues which are used to support the other functions including political activities. The *Abood* case also mentioned the possibility of internal remedies when it stated:

> "In view of the newly adopted Union internal remedy, it may be appropriate under Michigan law, even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary

> utilization by the parties of that internal remedy as a possible means of settling the dispute."

(*Abood v. Detroit Board of Education*, 431 U.S. at 242)

All of the above decisions referred to deal with an individual's First Amendment rights versus the organizations use of mandatory dues for activities other than the principal activities of the organization. To date where the issue has been properly raised, the individual's First Amendment rights have consistently prevailed.

II

PRELIMINARY STATEMENT

Is an Attorney at Law today a member of an ancient and honorable profession? — or — Is lawyering today just another vocation?

Today in a profession and in most vocations a person is required to have specialized training and skill. Today in a profession and in most vocations a person is required to successfully complete some organized program or test prescribed by his peers or the State. Today only in a traditional profession do we find as a purpose the service to others before self-interest, *i.e.*, "never to reject, for any consideration personal to himself or herself, a cause of the defenseless or the oppressed." (Bus. & Prof. Code § 6068(h))

Although the concept of service to others before oneself is not embraced by all members of the legal profession, it is this philosophy which in 1927 legislatively created the integrated

State Bar of California. (Statutes 1927, Chapter 34, Section 23) This philosophy today is also expressed in Business and Professions Code § 6031.

It is relatively simple to make the legal profession into a vocation and undoubtedly some lawyers would advocate that this should be done. With little more than a stroke of a pen any State Legislature could create a "Lawyers Professional Standard and Licensing Board" under some applicable consumer agency of government and lawyering becomes a licensed vocation.

In California the State Bar is a public corporation created by the Legislature as an administrative arm of the Supreme Court for the purpose of assisting in matters of admission and discipine of attorneys. (*Emslie v. State Bar*, 11 Cal.3d 210) The State Bar annually licenses attorneys.

The issue in the instant case is phrased as follows:

> "Whether the integrated State Bar of California, created and governed by State law, has the right to enter into a contract for legislative advocacy (on matters yet unknown) and spend mandatory membership dues for that purpose over the objection of one member?"

If the answer to the above question is yes, the Bar Association does have that right, then Appellant would ask one further question.

Would this Court's answer to the same question be different if the objection to the contract was made by ten members, or one hundred members, or one thousand members, etc.?

Appellant contends that an integrated state bar association has no authority and no right to legislative advocacy as an association. The right of legislative advocacy is possessed only by the individual. The individual may exercise that right by voluntarily associating himself with other individuals for that purpose. An integrated bar association is not voluntary association.

III

THE *ABOOD* CASE AND AN INTEGRATED BAR ASSOCIATION (THE SAME, YET DIFFERENT)

Abood v. Detroit Board of Education, (431 U.S. 209) has been summarized as follows:

> ". . . [D]issident teachers alleged that they were compelled to pay fees to a statewide teachers' union as a condition of employment and that a portion of those fees were used to finance activities unrelated to collective bargaining or to any other legitimate purpose of the union. Plaintiffs contended that this violated their rights to freedom of speech and association. The Court held that a sufficient claim has been stated."

(*Arrow v. Dow*, U.S.D.C. of N.M., 78-434; now on appeal before the Tenth Circuit Court of Appeals)

Appellant adopts the above language as his own statement. The statement is of no persuasive legal authority in this case other than to illustrate distinctions which exist in the *Abood* case.

The trial Judge who made the above summary statement was considering whether or not a group of lawyers had stated a civil rights class action claim against an integrated state bar in a Federal Court. Appellant's claim is an individual claim of First Amendment rights as against a state bar in a State Court.

The above statement does not consider the major distinguishing facts between the *Abood* situation and an integrated state bar. The dissident teachers only had to pay money to the union. Membership in the union was a matter of individual choice to the teachers. Appellant must pay money in the form of membership dues and also must be an active member of the integrated State Bar of California in order to practice his chosen profession or Appellant may be subject to criminal penalties. (Bus. & Prof. Code § 6126)

A civil rights class action by attorneys against an integrated bar association seeking to recover a portion of dues paid plus damages poses special practical problems. Appellant seeks no return of dues or damages and has not requested even attorney fees, but only reimbursement of his actual costs and expenses. This distinction is extremely important for two reasons.

1. Assuming a damage award of $100,000.00, who pays it? In California the only general funds available to pay such an award of damages are the mandatory membership dues of the State Bar.

2. Assuming a decree requiring that dues be refunded, who pays it? In California the only general funds available to pay

such a decree are the mandatory membership dues of the State Bar.[3]

A judgment awarding either damages and/or dues refunds could bankrupt a state bar. At best, the recognition of the right to a dues refund could seriously impair the financial operations of a state bar.

Appellant submits that when membership is mandatory in an organization such as an integrated state bar, a solution of dividing dues into mandatory dues and optional dues is not a viable solution. Attorneys have and will continue to act as legislative advocates. A legislative advocate employed by an integrated state bar, expressly or impliedly, speaks for the organization and all of its members even though a majority of the members refuse to pay the optional dues that finance said legislative advocate.

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[3] For an understanding of the financing of the integrated State Bar of California see A Report on the California State Bar by the Legislative Analyst of the State of California (March 1980).

The admissions program and various other special fund programs are self-supporting. The annual licensing program costs approximately $3.75 per active member per year. The disciplinary function costs approximately $51.25 per member per year for a total annual cost per year per active member of $55.00 per year, or a total of $3.5 million in 1979. Approximately $7 million was raised in membership dues in 1979 and the general fund programs were supported by an additional $1.2 million representing interest from dues and other incidental revenues. The anticipated general fund surplus at the end of 1980 for the State Bar of California is Three Hundred Sixty-Five Dollars ($365.00).

The 1981 dues bill requests $85.00 annual dues for young lawyers (3 yrs. or less) and $135.00 for other members, the net effect is an increase in State Bar revenues.

The alternative solution is an internal type of remedy referred to in the *Abood* case even though the majority opinion in a footnote stated:

> "We express no view as to the constitutional sufficiency of the internal remedy described by the appellees. If the appellants initially resort to that remedy and ultimately conclude that it is constitutionally deficient in some respect, they would of course be entitled to judicial consideration of the adequacy of the remedy.

(*Abood*, supra, footnote 45)

Appellant suggests that a group of attorneys working together can devise a constitutionally acceptable solution. Attached as Appendix B is a brief outline of such a solution in the legislative field.

What is now needed is a decision which states that an integrated state bar has no right to act as a legislative advocate unless it has the unanimous, specific authority of all of its members.

IV

CONSTITUTIONALLY ACCEPTABLE VARIATIONS FOR BAR ASSOCIATIONS

Appellant has used the term "vocational licensing agency." This term refers to an organization which performs primarily three functions. The functions of admission, the functions of licensing, and the functions of discipline. When speaking of a bar association the authority for the admissions function and

the discipline function is the inherent authority of a Supreme Court to control the members who appear before that Court. The functions of admission, licensing and discipline may also be a legislative exercise of the police power or taxing power or a combination thereof. The manner of the creation of such an agency appears immaterial to this discussion. Likewise, the financing of such an agency from either state funds or dues and fees or a combination thereof appears immaterial to this discussion. A vocational licensing agency need not be a state bar. However, an integrated state bar may be a vocational licensing agency and so long as said state bar restricts its activities to the enumerated three functions, no legislative advocacy problems are presented. Appellant submits that an integrated vocational state bar has no right to use membership dues for the purpose of legislative advocacy.

The term "professional bar association" is meant by Appellant to cover all of the voluntary associations of attorneys. It may be large, such as the American Bar Association, or small, such as local or specialty bar associations. This type of organization is not controlled or supported by the State. Membership is voluntary and the organization is supported by the dues of its members. Appellant submits that this type of an organization has the right to use membership dues for legislative advocacy provided that such advocacy is within the scope of the rules or by-laws governing said association.

Appellant now inserts a new term "an integrated professional bar association." By this term Appellant means an organization with mandatory membership and dues. The organization would perform pursuant to State authority the integrated vocational bar association functions previously discussed. In addition

thereto, by majority vote of the members, an integrated professional bar association would perform services to its members and to the public. This is a hybrid organization using the State powers to cover the vocational needs and utilizing the membership authority to cover the professional needs. Due to the mandatory nature of the membership there would be a minimal encroachment on the First Amendment rights of association. Due to the mandatory payment of dues there would be a minimal encroachment upon the Fifth Amendment rights concerning property. Due to the decline in professionalism among attorneys in the past several years, an integrated professional bar association properly designed could probably pass constitutional scrutiny if a majority of the membership desired such an organization. An integrated professional bar association would not have the right of legislative advocacy.

The California State Bar today claims to be none of the above defined organizational types. As an integrated state bar it performs the primary functions which justify its existence, namely, admissions, licensing and discipline at a cost of approximately 50% of its over $13 million annual budget. If the State Bar of California were to be defined in traditional organizational terms, a fair statement would be: dictatorship by committee with broad statutory authority and minimal judicial interference. This is why the members of the state bar organized the Monterey Committee in 1979 to study the problems which exist within the California State Bar. The final report of that committee is expected by September, 1980, and will be discussed at the State Bar Convention commencing September 26, 1980, Monterey, California.

The purpose of this discussion concerning the constitutionally acceptable variations of bar associations was not to seek prior approval of this Court as to any individual type of organization. The discussion was not intended to embarrass the Board of Governors of the State Bar of California or any of the staff of said bar association.

The purpose for this organizational discussion was to emphasize that in the *Abood* case this Court gave a Union the opportunity of solving its own problems. The State Bar of California is in the process of solving its own problems.

California attorneys are aware that when an individual becomes a member of the legal profession we give up our Fifth Amendment right against self-incrimination as to bar disciplinary proceedings. (*Cohen v. Hurley*, 366 U.S. 117) We know we give up our First Amendment right of association when compelled to join an integrated bar association. (See *Hanson* and *Lathrop, supra*) What California lawyers do not know is whether or not we also surrender our First Amendment right to have an opinion and to advocate that opinion when compelled to join an integrated bar association.

CONCLUSION

Appellant respectfully submits that this Honorable Court has jurisdiction of this appeal under 28 U.S. § 1257(2) or has jurisdiction under certiorari per 28 U.S. § 1257(3) based upon the foregoing authorities.

It is respectfully submitted that an individual lawyer does have a First Amendment right to have an opinion and to

advocate that opinion and that an integrated state bar association has no right of legislative advocacy.

Finally, the Supreme Court of California should decide what disposition is to be made of the 1980-81 lobbying contract and California lawyers should be free to decide the future of the California State Bar, these decisions to be in conformity with the constitutional principles set down by this Court.

Respectfully submitted,

ALDEN J. FULKERSON

Attorney and Appellant

APPENDICES

L. A. No. 31224

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FULKERSON, Petitioner

v.

THE STATE BAR OF CALIFORNIA ETC.

Petition for writ of review and/or mandamus is denied.

Chief Justice

Appellant contends that an integrated state bar shall not lobby if one member objects, however, Appellant does not mean that a state bar must avoid all contact with the legislative arena. This Appendix illustrates that an integrated state bar may inform its members of proposed legislative change, may sponsor discussions of possible legislative change, and may coordinate the lobbying efforts of each member without violating even one member's First Amendment rights.

The Legislature of California is prolific in adopting new laws. It is not unusual that four to five thousand bills, each containing proposed changes, are introduced in a legislative session. In the past three years over three thousand eight hundred new statutes were enacted. This means that literally thousands of individual code sections have been added or changed. At the present time the California lawyer learns of these changes after the fact when the annual supplements to the Codes are published.

Appellant urges that legislative advocacy is a matter for the individual lawyer. It is obvious, due to volume, that the individual lawyer cannot follow the legislative process. Appellant therefore suggests that a proper function of an integrated professional state bar is informing the members of proposed changes in the law affecting their practice. Although changes in the law are important to all practicing lawyers, it is a fact that not all lawyers are interested in the changing law. Appellant therefore suggests that the following procedure for service to its members is constitutionally acceptable.

1. The State Bar notify all members that on request they may receive notification of proposed changes of the law in intelligible capsule form.

2. The State Bar should prepare such a list of bills and mail it to the interested members.

3. The State Bar should inform all members of the following services available to the individual member in connection with the legislative process.

a. Location and availability of copies of bills;

b. The acceptance by the State Bar of individual letters commenting on particular bills to be delivered to the appropriate legislator (without State Bar comment) in order that communications are presented to the correct committee or subcommittee.

c. To refer an individual member to a legislator who is interested in the type of legislation proposed by the member for the purpose of sponsorship of the members' bill.

d. To assist any member who desires to appear and testify concerning a particular bill as to where, when and how testimony is taken and to whom the member should speak in regards to his individual lobbying efforts. (Be that individual member a new admittee or the President of the State Bar.)

In daily practice lawyers discover laws or procedures which warrant a consideration for change. Lawyers need a forum other than the Legislature in which to discuss these needed changes. It is therefore submitted that it would be proper for an integrated professional state bar to provide such a forum. All members of the bar should be advised of the substance of the subject matters to be discussed at that forum. In addition, all members should be advised as to the location of where copies of the full text of resolutions to be discussed are available. The individual members should be urged to express their opinions either in person at the forum or through the representatives in attendance or in writing.

If a proposed change received no opposition either in writing or at the forum it could be assumed that unanimous consent of the membership was given to the State Bar to sponsor such a resolution. To err on

the side of caution, Appellant suggests that the advocacy should be left to the proponent of the resolution. Integrated professional state bar participation should not exceed nominal participation such as reimbursement of actual travel costs to the State Capitol.

The integrated professional state bar should inform the appropriate legislators of the fact of the result of the discussion at the forum in the event that a particular resolution should come before the Legislature in bill form.

All of the aforementioned activities by an integrated professional bar association are submitted as possible without the expression of a single opinion as a state bar opinion.

The success of such a program depends entirely upon the communication of information from the State Bar to the membership.

By this Appendix B, Appellant seeks only to point out that an Integrated Professional Bar Association could be of great service to its members in the legislative field without any legislative advocacy. Appellant expresses no opinion as to what new organizational format, if any, may be adopted by the members of the State Bar of California.